Supreme Court, U.S.
FILED

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No. ____

IN THE
SUPREME COURT OF THE UNITED STATES

LARRY CHAMBERS,
Petitioner,

v.

BYRON McCLENNEY, et al.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Did petitioner present sufficient evidence below to create a genuine issue regarding whether the respondents' proffered reasons in response to the petitioner's established prima facie cases on his claims of race discrimination, age discrimination, and retaliation were pretextual in order to avoid summary judgment?

PARTIES TO THE PROCEEDING

LARRY CHAMBERS,

Petitioner,

v.

BYRON McCLENNEY, individually and in his official capacity as President of the Community College of Denver; JERRY WARTGOW, individually and in his official capacity of President of the State Board for Colorado Community Colleges and Occupational Education; MARY ELLEN McELDOWNEY, individually and in her official capacity as Vice-President for Legal Affairs for the State Board of Colorado Community Colleges and Occupational Education System; GLENDA BARRY, ROLF ANDERSON, SUSAN AYRES DAVIES, JOHN FREW, JULIANNE HAEFELI, WILLIAM HORNBY, KRISTY SCHLOSS, RALPH TORRES, and RAYMOND WILDER, in their official capacity as voting members of the State Board for Community Colleges and Occupational Education; THE COLORADO STATE BOARD FOR COMMUNITY COLLEGES AND OCCUPATIONAL EDUCATION; and THE COMMUNITY COLLEGE OF DENVER,

Respondents.

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Petitioner, Larry Chambers, respectfully requests that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Tenth Circuit affirming the ruling of the United States District Court for the District of Colorado in this case granting the respondents summary judgment.

OPINION BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit in this matter is unreported but is contained in the Appendix. (App. A) The ruling of the district court is contained in Appendix (App. B)

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Tenth Circuit was entered on January 11, 1999 and petitioner's petition for rehearing was denied on March 3, 1999.

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

There are no statutory provisions ***per se*** involved in this petition as this petition concerns the issue of the evidence required to create a genuine issue of pretext in response to the respondents' proffered explanations to petitioner's established prima facie cases of race discrimination, age discrimination and retaliation in order to avoid summary judgment.

STATEMENT OF THE CASE

A. Background of Material Facts:

The petitioner commenced this action on January 22, 1997 in the United States District Court for the District of Colorado against the respondents alleging discrimination against him because of his race, age and retaliation for engaging in protected activities when respondents terminated his employment. The jurisdiction of the district court was invoked pursuant to 28 U.S.C. §§1331(3) and (4); 29 U.S.C. §§626(c) and 633a(c); and 42 U.S.C. §2000e-5(f).

Petitioner is presently a fifty-five year-old African-American citizen who possesses a bachelor's degree in psychology, a master's degree in public administration and a Ph.D. in public administration.

The respondent Community College of Denver (hereinafter "CCD") is one of thirteen community colleges which are governed by the Colorado State Board of Community Colleges and Occupational Education (hereinafter "CSBCCOE"). Respondent CSBCCOE is a lay board consisting of nine voting members appointed by the governor of the State of Colorado. Respondents Glenda Barry, Rolf Anderson, Susan Ayres Davies, John Frew, Julianne Haefeli, William Hornby, Kristy Schloss, Ralph Torres, and Raymond Wilder served on the CSBCCOE. Defendant Wartgow was President of CSBCCOE at the times relevant to this case. Respondent McClenney is the President of CCD. In his role as President of CCD, respondent McClenney has the authority to hire and fire CCD personnel. Respondent McEldowney serves as Vice President of Legal Affairs for CSBCCOE, including supervision of the CSBCCOE's human resources office. Although there is no official CSBCCOE policy which

requires community college presidents to consult with McEldowney prior to making personnel decisions, the petitioner asserted that the past practice of community college presidents was to consult McEldowney prior to making such decisions as he was involved in such consultations in his capacity of the Director of Human Resources at CCD. The factual assertions outlined below were contained in petitioner's affidavit submitted by him in opposition to the respondents' motion for summary judgment.

In March of 1988, petitioner commenced his employment at CCD. Petitioner served as the Director of Human Resources and the Affirmative Action Officer. In his capacity as the Director of Human Resources, petitioner reported to the Vice President of Administrative Services, Steve Hunter. Mr. Hunter is presently retired.

According to respondents, the classified and faculty councils, which are groups that represent CCD employee constituencies, began to express concerns about petitioner's administration of the CCD Human Resources Department in 1992 and 1993. Although the alleged complaints lacked specificity, the respondents asserted that the complaints addressed an alleged poor quality of employee handbooks and the lack of responsiveness from petitioner's office. The petitioner asserted that he knew of no complaints from faculty and the complaints from others of which he was aware were not valid. Petitioner asserted that the employee handbooks had been complimented upon regarding their quality and that any problem with the handbooks was due to McClenney's refusal to provide necessary resources for the Human Resources Department. During the relevant period, the size of the CCD student population and staff doubled and petitioner's requests for increases in the size of the Human Resources Department staff were ignored by McClenney. Furthermore, the

employee handbook was listed as one of his major accomplishments by his immediate supervisor (Hunter) in petitioner's formal written performance evaluation for the year 1990-91.

Respondents contended that McClenney met with petitioner on several occasions to discuss concerns about petitioner's performance, with the first such meeting occurring in 1994. The petitioner acknowledged that a meeting did occur in July of 1994 but asserted that the meeting did not address any criticisms of his performance. The subject of the meeting concerned petitioner's management style about which some disgruntled employees raised questions. According to respondents, McClenney met again with petitioner in 1995 regarding the "critical need to improve [h]is office." Petitioner asserted that this meeting never took place. According to respondents, in 1996 McClenney met with a large group of classified employees who raised serious and extensive concerns about petitioner's administration. The petitioner asserted that the respondents' contentions regarding the 1996 meeting were overblown and further that only two persons of the thirty to thirty-five or so persons in attendance had anything negative to express about the operation of the human resources office.

In early 1996, there was an evaluation of McClenney's performance as CCD President. This evaluation of McClenney, in part, took the form of a college-wide survey. The survey form used in connection with the survey included a section for general comments. Certain negative comments about petitioner and the operation of his office were made on several of the forms which were returned. Petitioner did not dispute that several negative comments were received but contended that McClenney listed several comments from the same individual but later separated the comments in a written

summary of the complaints prepared by him to appear as though more individuals had made the criticisms which was not the case.

The petitioner was employed under a series of contracts, subject to annual renewal, which were renewed each year until the date of his termination on June 30, 1996. In April 1996, Hunter advised the petitioner that McClenney told him that the petitioner must resign and when he (Hunter) attempted to "speak up" fo the petitioner, McClenney cut him off and demanded petitioner's resignation. Hunter advised petitioner that McClenney stated that if petitioner didn't resign, he (McClenney) would "do it another way." Petitioner refused to tender his resignation because the complaints were untrue, unverified and should not have been used as the basis to end his career at CCD. At the time, the petitioner's most recent job performance evaluation rated his performance as "highly successful".

Upon petitioner's refusal to tender his resignation, McClenney ordered a survey of the Administrative Services areas under Hunter's supervision which included the Human Resources Department which the petitioner supervised. The petitioner made recommendations regarding the content and methodology of the survey which recommendations were ignored. After the survey was completed the petitioner requested a meeting with the person who prepared the survey questionnaire (Greg Smith) to discuss the results for fairness and objectivity but Smith refused to discuss this issue. Petitioner was told by Smith in Hunter's presence and with his concurrence "We did it the way Byron (McClenney) wanted it done."

On June 25, 1996, McClenney wrote a letter to petitioner advising him that he would not receive a contract

for the 1996-97 academic year thus ending petitioner's continuous employment effective June 30, 1996. At time of petitioner's termination he was earning an annual salary of $55,600 and had in excess of thirteen years' experience at the manager-director level. Shortly thereafter, respondents hired Barbara Wilson to replace petitioner. Wilson is a Japanese-American woman who was 42 years of age at the time of her hiring who had little, if any, permanent human resources management experience. Her starting salary at CCD was $60,000 per year. Also under Hunter's supervision was Niles Downen, Controller of CCD, who is a white male significantly younger than the petitioner. Respondents paid Downen $62,000 per year in 1995-96. On several occasions, during the course of his employment, the petitioner complained about the level of his salary in comparison to his white counterparts, in particular, Niles Downen who had only a bachelor's degree and far less education and experience than petitioner at the manager-director level. Mr. Downen was nine years younger than petitioner.

B. The Proceedings Below:

As indicated above, the petitioner commenced the action below on January 22, 1997. On May 19, 1997, the respondents filed their Answer generally denying the petitioner's allegations and additionally asserting several affirmative defenses. The parties completed discovery and the matter was set for a jury trial.

The respondents filed a motion for summary judgment with supporting brief and documents on August 13, 1997. On September 10, 1997 the petitioner filed his memorandum brief, his affidavit and supporting documents in opposition to the motion. On September 22, 1997 the respondents filed a reply brief to the petitioner's response brief. A Pretrial Order

was tendered to the district court on October 17, 1997 at which time the district court made certain modifications to the order, signed the order and scheduled the matter of a four-day jury trial to commence on December 8, 1997. At a pretrial conference held on October 17, 1997 the district court issued an oral ruling from the bench denying the respondents' motion for summary judgment, in part, and granting it, in part. At this pretrial conference the district court indicated that it would follow up its oral ruling with a formal written order and memorandum of decision the following week. Contrary to the district court's oral ruling from the bench on October 17, 1997 and, without any additional evidence being brought to its attention by the parties, the district court reversed its earlier ruling and issued an Order and Memorandum of Decision on November 20, 1997, granting the respondents' motion for summary judgment in its entirety dismissing all of petitioner's claims.

The district court, in its written decision, held that the petitioner had established prima cases of race discrimination, age discrimination and retaliation but concluded that the petitioner had failed to establish his burden of demonstrating that the proffered explanations of the respondents were pretextual. Judgment was entered by the clerk of the district court on the district court's Order and Memorandum of Decision on November 21, 1997. On December 19, 1997 the petitioner filed a timely notice of appeal appealing the ruling of the district court to the Tenth Circuit Court of Appeals. After written briefs were filed by the parties, the Tenth Circuit Court of Appeals, on January 11, 1999, issued it Order and Judgment affirming the ruling of the district court. The petitioner filed a timely petition for rehearing which was denied by the Tenth Circuit Court of Appeals on March 3, 1999.

REASONS FOR GRANTING THE WRIT

I.

THE PETITION SHOULD BE GRANTED BECAUSE THE OPINIONS AND RULINGS BELOW REQUIRED PETITIONER TO ESTABLISH MORE THAN WAS REQUIRED UNDER MCDONNELL DOUGLAS V. GREEN TO DEMONSTRATE THAT THE PROFFERED EXPLANATIONS OF THE RESPONDENTS IN RESPONSE TO THE PETITIONER'S ESTABLISHED PRIMA FACIE CASES OF DISCRIMINATION AND RETALIATION WERE MERELY A PRETEXT FOR UNDERLYING DISCRIMINATION AND RETALIATION.

As indicated above, the district court granted respondent's motion for summary judgment finding that the petitioner had failed to establish that the respondents' proffered explanations in response to the petitioner's established prima facie cases of race discrimination, age discrimination and retaliation were merely a pretext for underlying discrimination and retaliation. The ruling of the district court was affirmed by the Court of Appeals on all three claims. The petitioner submits that he submitted sufficient evidence of pretext on all three claims sufficient to create genuine issues to avoid summary judgment.

ARGUMENT

Fed.R.Civ.P., Rule 56(c) states that summary judgment is proper only when "there is no genuine issue as to any material fact and . . . the moving party is entitled to judgment as a matter of law." Federal courts are in agreement that the party moving for summary judgment has

the burden of showing the absence of any genuine issue as to all the material facts which would entitle him to judgment as a matter of law. See Celotex Corp. v. Catrett, 477 U.S. 317 (1986); Weinberger v. Hynson, Wescott & Dunning, 412 U.S. 609 (1973); and Adickes v. S.H. Kress & Co., 398 U.S. 144 (1970). Furthermore, before summary judgment may enter, there must be no doubt from the evidence with all possible reasonable inferences drawn in favor of the non-moving party that no genuine issue of material fact remains for trial and that the moving party is entitled to judgment as a matter of law. Celotex Corp. v. Catrett, supra at 322. See also Bee v. Greaves, 744 F.2d 1287, 1296 (10th Cir. 1984) and Hutton v. Foremost Financial Service Corp., 724 F.2d 112, 116 (10th Cir. 1983). To satisfy the burden placed upon the party bringing the motion, the movant must make a showing that it is quite clear what the truth is and that it excludes any real doubt as to the existence of any genuine issue of material fact. See Poller v. Columbia Broadcasting System, 368 U.S. 464 (1962) and Adickes v. S.H. Kress & Co., supra.

The Court of Appeals was required to review de novo the district court's granting of summary judgment in favor of respondents and apply the same standard that was employed by the district court. See Panis v. Mission Hills Bank, N.A., 60 F.3d 1486, 1489 (10th Cir. 1995) and Applied Genetics Int'l., Inc. v. First Affiliated Securities, Inc., 912 F.2d 1238, 1241 (10th Cir. 1990). With the de novo standard of review to be applied, the Court of Appeals was to examine the pleadings, depositions, answers to interrogatories, together with the affidavits to determine whether there was no genuine issue as to any material fact before summary judgment could enter. See Panis v. Mission Hills Bank, N.A., supra at 1490. In addition to the factual record before the Court, all reasonable inferences which can be drawn from the facts must

be inferred in the light most favorable to the non-moving party. See Concrete Works, Inc. v. City and County of Denver, 36 F.3d 1513, 1518 (10th Cir. 1994); Blue Circle Cement, Inc. v. Board of County Commissioners, 27 F.3d 1499, 1503 (10th Cir. 1994) and Deepwater Invs. Ltd. v. Jackson Hole Ski Corp., 938 F.2d 1105, 1110 (10th Cir. 1991).

Employment discrimination cases such as this case are to be analyzed under the three-step, burden-shifting analysis as set forth in this Court's decision in McDonnell Douglas v. Green, 411 U.S. 792 (1973). See also Trujillo v. University of Colorado Health Science Center, 157 F.3d 1211, 1215 (10th Cir. 1998). The first step of the analysis is to ascertain whether the petitioner established prima facie cases of discrimination and retaliation under the theories which he advanced. As indicated above, the district court held that the petitioner had established prima facie cases under the theories he advanced and the Court of Appeals did not disturb this holding on review. Therefore, the petitioner will not address the issue of whether or not he established prima facie cases under the theories he advanced below in this petition.

The district court found that the respondents had met their burden of production under the burden-shifting analysis by offering a facially neutral, non-discriminatory, legitimate business reason for terminating the petitioner, namely, significant criticism by the personnel whom the petitioner was employed to assist and advise. The Court of Appeals agreed with the district court that such criticism constituted a legitimate reason for the petitioner's termination. However, the criticisms lacked specificity and were the result of hearsay comments obtained through faulty, unfair surveys. In addition, there were also criticisms of other white departmental managers and supervisors yet, despite these

criticisms, these individuals were retained without any negative impact upon their continued employment.

Continuing with the three-step, burden-shifting analysis under McDonnell Douglas and Trujillo, it was then incumbent upon the petitioner to present sufficient evidence creating a genuine issue that the respondents' proffered explanations were a pretext for underlying discrimination and retaliation.

In order to satisfy this third step of the three-step, burden-shifting analysis, the petitioner was required to show that the offered explanations, were pretextual, either, directly, by offering evidence that a discriminatory reason more likely motivated the employer or, indirectly, by presenting evidence showing that the respondents' offered explanations were unworthy of credence. Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 256 (1981). Direct evidence of discrimination, such as the use of racial or age-based epithets or slurs, is rarely found in employment discrimination cases thus forcing a victim of discrimination to offer indirect evidence that the employer's offered explanation is unworthy of credence therefore establishing such explanation to be pretextual. Texas Department of Community Affairs v. Burdine, supra, at 256. See also Randle v. City of Aurora, 69 F.3d 441, 451 (10th Cir. 1995). On this point (direct evidence of discrimination), the petitioner offered evidence that a white faculty member who was the chairperson of the faculty council made an insensitive, racially derogatory comment in historical reference to Blacks, namely, "This is not a lynching!", in the presence of petitioner and McClenney at a meeting attended by twenty or so faculty and staff members yet McClenney took no action whatsoever to admonish or rebuke the faculty member for making the remark. Additionally, petitioner offered evidence that

minority administrators and faculty (Blacks and Hispanics) were being removed from their positions in significant numbers by McClenney as further direct evidence of discrimination.

On the issue of indirect evidence of pretext the Court of Appeals agreed with the district court's rejection of two of the arguments of the petitioner advanced to establish pretext, namely, the pay disparity between petitioner and his younger, white counterparts and the deployment of the survey upon which the petitioner's termination was allegedly based. The petitioner, as will be shown below, offered more than simply the pay disparity and the survey deployment to establish that the respondents' offered explanation were pretextual.

With regard to the issue of the pay disparity as evidence of pretext, the district court as well as the Court of Appeals held that petitioner's evidence was insufficient to establish that the person with whom the petitioner was comparing himself regarding salaries was sufficiently similarly situated to make such a comparison probative or meaningful. In his salary disparity complaints, first raised in 1991, the petitioner compared himself to the above-referenced white male controller at the Community College of Denver, Niles Downen, who was earning approximately $6,500 per year more than the petitioner. The petitioner re-newed his complaint about this same salary disparity in 1995 a year before his termination. The petitioner submitted evidence that the controller had a bachelor's degree and six years' experience in comparison to petitioner's master's degree and thirteen years' experience at the manager-director level. With regard to the issue of whether the petitioner and the controller were sufficiently similarly situated to make a valid comparison, the Court of Appeals apparently overlooked the additional evidence offered by the petitioner in the form of a

survey published by the respondent system of all community colleges throughout the Colorado Community College and Occupational Educational system which clearly showed that controllers and human resources directors were at the same level and that controllers earned less than the directors of the human resources departments which was the position that the petitioner held at the time. While it is true that controllers and directors of human resources departments within the state community college system do not perform precisely the same job, they are ranked in the same pay grade, and it was instructive and probative to ascertain where each of these positions ranked in the overall hierarchy of positions within the community college system. Additionally, the petitioner offered admissible evidence, ignored or overlooked by the Court of Appeals, that his supervisor, Steve Hunter, indicated to him that he would have paid him a higher salary in comparison to the salary earned by the controller (Downen) but that respondent McClenney would not allow it. This occurred early in the petitioner's tenure, however, such a salary increase was again denied in June of 1995, at the point in time when petitioner's performance was rated as "highly successful". The petitioner also offered evidence that a couple of his peers in the community college system were also earning approximately $4,500 per year more than the petitioner. The petitioner also offered evidence that when white administrators registered complaints about their salaries, they were given several increases to make up for perceived salary inequities while petitioner's salary complaints were ignored.

The Court of Appeals apparently adopted the reasoning of the district court that any pay disparity, even if shown to be discriminatory, would not have undercut the reasons advanced by the respondents for the petitioner's termination. Assuming arguendo that this assessment is

accurate or legitimate, the pay disparity evidence was such that a reasonable juror could draw the inference that the petitioner was treated differently than his significantly younger, white male counterpart because the petitioner was older, African-American thus establishing racial and age bias or animus which would be germane to the ultimate issue of whether or not the petitioner was discriminated against because of his age and/or race with regard to his termination. The Court of Appeals misconstrued the evidentiary impact that such evidence could have had on a reasonable juror charged with the responsibility of determining whether there was an intent to discriminate against the petitioner.

On the issue of the survey deployment as evidence of pretext, the district court as well as the Court of Appeals rejected the petitioner's attack on the survey as being improperly designed and interpreted and further dismissed the petitioner's contentions that the survey elicited complaints about his performance which were unfounded and racially motivated as mere unsubstantiated suspicions. While it may be true that an employee complaining of discrimination cannot simply rely upon mere suspicions that the employer's actions are motivated by discriminatory animus, such was not the case here because the petitioner offered more than his mere suspicions which evidence was apparently ignored or overlooked by the Court of Appeals. The petitioner offered evidence that the survey was not deployed until after the petitioner refused to tender his resignation when Hunter told petitioner that McClenney advised him that the petitioner must resign and, if he didn't, he (McClenney) would "do it another way." Further, Hunter advised the petitioner that when Hunter attempted to "speak up" for the petitioner, he was cut off by McClenney and petitioner's resignation was demanded.

Also, with regard to the survey, the Court of Appeals found that the petitioner's challenge to the survey consisted of generic complaints that the survey was not conducted in accordance with his wishes and petitioner's unsubstantiated opinion that biases of those responding to the survey skewed the results against the petitioner and his staff. The Court of Appeals overlooked the petitioner's evidence that the petitioner, Hunter and Smith agreed that the survey would be conducted in a certain manner to ensure fairness which manner was not followed despite the prior agreement. The courts below further dismissed the evidence from petitioner's survey expert who challenged the fairness and bias in the manner in which the results of the survey were construed.

Further, the Court of Appeals noted that the last formal written evaluation of the petitioner's job performance was unsigned by McClenney and seemed to suggest that there was some sort of remoteness in time problem because the period covered by the evaluation was not precisely the same period during which the decision to terminate the petitioner's employment was made. The Court of Appeals overlooked the fact that Hunter was the petitioner's immediate supervisor and that he (Hunter) was designated as the person to evaluate the petitioner's job performance. In his role as the evaluator of the petitioner's job performance, Hunter was in the best position to determine the petitioner's level of performance which he rated as "highly successful" during the period of July 1, 1994 to June 30, 1995. This was the last written performance evaluation that the petitioner received. Hunter's assessment of petitioner's performance had not changed until such time as McClenney demanded petitioner's resignation. Whether or not the formal written evaluation of the petitioner's job performance was signed by McClenney is of little significance or importance due to the fact that McClenney was not the petitioner's immediate supervisor

charged with the responsibility of supervising the petitioner's day-to-day activities. The person who had that responsibility was Hunter. The petitioner should not be held to be at fault or the level of his performance diminished simply because McClenney, for reasons unknown, did not sign off on the evaluation. With regard to the period of time covered it is clear that the petitioner's then most recent written performance evaluation was that which covered the period July 1, 1994 to June 30, 1995. Additionally, during 1996 Hunter advised McClenney that the petitioner and his staff in the Human Resources Department were doing a "good job." The "bottom line" should have been whether or not the petitioner was performing satisfactorily and it is clear that he was based on the record. Additionally, the treatment that the petitioner received was unfair and contrary to CCD's equal employment opportunity policies regarding terminations which policies were signed by McClenney.

The proffered explanation of the respondents is also unworthy of credence for a variety of other reasons shown by the petitioner among which were the following:

1. When the petitioner inquired of McClenney in the spring of 1996 of the specifics of any complaints against him, McClenney could not provide any specifics to the petitioner.

2. McClenney acknowledged to the petitioner that a newly-adopted state-mandated employee reclassification system which the petitioner was charged to administer was the cause of the classified employees' discontent. Furthermore, respondent McClenney advised the petitioner that the complaints by the classified employees were "irrational" and said employees simply needed somewhere where they could "vent" their frustrations such as the Human Resources Department.

3. In March of 1996 a meeting was scheduled with the classified employees during which they were going to be given the opportunity to express their concerns and McClenney ordered the petitioner and Hunter to leave the meeting depriving him of the opportunity to defend himself regarding any complaints lodged against him.

4. McClenney failed to support the petitioner and his staff in their effort to carry out their mission which caused a CSBCCOE board member to express a concern about McClenney's failure to support the CCD's Human Resources Department which may have generated negative perceptions of the petitioner and his office.

5. Another department, namely, the Accounting Department, supervised by a white male (Downen) also received negative comments and criticisms in the survey forms which were returned yet no action was taken against him to remove him or otherwise discipline him.

6. The format of the survey was changed from that which was previously agreed to by the petitioner, Hunter and Smith which resulted in extremely biased, skewed results and McClenney used these results to terminate petitioner's employment.

7. Based upon historical precedent with which the petitioner was intimately familiar as a result of his lengthy experience as the Human Resources Director at CCD, this was the first instance in which survey results were used to terminate a manager's employment which was a gross deviation from the past practice of utilizing written performance evaluations to assess performance. Further, it was a gross deviation from CCD's published equal

opportunity policies regarding terminations which policies were signed by McClenney as the President of CCD.

8. The petitioner's successor, a younger female with far less education and experience than petitioner, was compensated at a far greater rate than the petitioner.

The petitioner submits that there was substantial evidence from which inferences of discrimination could be drawn and further that he was entitled to the benefit of all possible reasonable inferences which could be drawn from such evidence. The courts below improperly denied the petitioner all possible, reasonable inferences to which he was entitled under applicable case law and such denial constitutes reversible error.

CONCLUSION

For the reasons stated above, the petitioner requests that his petition for be granted and that this Court review the decisions of the courts below.

Respectfully submitted,

/s/_____
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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

[Filed January 11, 1999]

No. 97-1468
(D.C. No. 97-N-125)
(D. Colo.)

LARRY N. CHAMBERS, SR.,)
Plaintiff-Appellant,)
)
v.)
)
BYRON MCCLENNEY, individually)
and in his official capacity as President)
of the Community College of Denver;)
JERRY WARTGOW, individually and)
in his official capacity as President of)
the State Board for Colorado Community)
Colleges and Occupational Education;)
MARY ELLEN MCELDOWNEY,)
individually and in her official capacity as)
Vice-President for Legal Affairs for the)
State Board of Colorado Community)
Colleges and Occupational Education;)
GLENDA BARRY; ROLF ANDERSON;)
SUSAN AYRES DAVIES; JOHN FREW;)
JULIANNE HAEFELI; WILLIAM)

HORNBY; KRISTY SCHLOSS;)
RALPH TORRES; RAYMOND WILDER,)
in their official capacities as voting members)
of the State Board for Community Colleges)
and Occupational Education; COLORADO)
STATE BOARD FOR COMMUNITY)
COLLEGES AND OCCUPATIONAL)
EDUCATION,)
Defendants-Appellees.)

ORDER AND JUDGMENT*

Before **BRORBY, BRISCOE**, and **LUCERO**, Circuit Judges.

After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. See Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument.

Plaintiff appeals from summary judgment entered in favor of defendants in this employment discrimination action. Following his termination as Human Resource Director for the Community College of Denver (CCD), plaintiff brought suit for injunctive relief, back pay, and damages against CCD and its president, as well as others less directly involved in the

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* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of 10th Cir. R. 36.3.

operative events. Although plaintiff initially pled several statutory causes of action, during the proceedings he has narrowed his claims to age and race discrimination, and related retaliation, under Title VII of the Civil Rights Act of 1964.

The district court held (1) plaintiff, a black man over the age of forty who was fired and replaced by a younger Asian woman within a year of complaining about his allegedly discriminatory salary, demonstrated a prima facie case of discrimination/retaliation; (2) defendants advanced a legitimate reason for his termination, namely substantial and vocal faculty/staff dissatisfaction with his performance as human resource director; and (3) plaintiff failed to present evidence sufficient to create a triable issue that this reason was pretextual. See Trujillo v. University of Colo. Health Sciences Ctr., 157 F.3d 1211, 1215 (10th Cir. 1998) (summarizing applicable burden-shifting analysis). We review this determination de novo, see id. at 1213, and affirm.

We agree with the district court that significant criticism by the personnel whom plaintiff was employed to assist and advise constituted a legitimate reason for termination. We turn, then, to the issue of pretext, which is the focus of this appeal. The district court explicitly rejected two primary arguments advanced by plaintiff on this issue. First, regarding an alleged pay disparity between plaintiff and some other CCD administrators, the court held plaintiff had not shown that those paid more were situated similarly enough to permit probative comparison. The court also noted that a pay disparity would not, in any event, undercut the reason

advanced for plaintiff's *termination.*[1] 1 Plaintiff insists the evidence, was relevant to his retaliatory discharge claim, because it was his complaining about the pay disparity that allegedly prompted defendants to fire him. See Appellant's Opening Br. at 18. Plaintiff mixes evidentiary apples and oranges here. His effort to justify complaints over pay equity do not prove the distinct proposition that those complaints--warranted or not--led to his termination.

The district court also rejected plaintiff's attack on the unfavorable staff survey completed shortly before his termination. Plaintiff contended it was improperly designed and interpreted, and claimed the complaints elicited about his performance were unfounded and racially motivated. The court correctly held that the latter claim reflected only plaintiff's unsubstantiated suspicions, which were not rendered admissible or probative simply by inclusion in a rambling thirty-seven page "affidavit." See Murray v. City of Sapulpa, 45 F.3d 1417, 1422 (10th Cir. 1995) ("To survive summary judgment, nonmovant's affidavits must be based upon personal knowledge and set forth facts that would be admissible in evidence; conclusory and self-serving affidavits are not sufficient.") (quotation omitted); Conaway v. Smith, 853 F.2d 789, 794 (10th Cir. 1988) (to defeat summary judgment, "a party cannot rest . . . on speculation, or on suspicion").

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[1] On appeal, plaintiff does not contend the pay disparity is, in itself, a distinct claim that should have been addressed as such by the district court. He argues it solely as a basis for finding pretext in connection with his termination.

As for the design/use of the survey, aside from an inadmissible hearsay comment from an alleged expert about the lack of a written methodology, plaintiff's challenge consisted of (l) a generic complaint that it was not conducted in accordance with his wishes, and (2) his unsubstantiated opinion that biases of negative respondents skewed the results and gave a false impression of his general standing with staff. We agree with the district court that for the purpose of showing pretext, this evidence was incompetent, see authorities cited immediately above, and/or insufficiently probative, see McKnight v. Kimberly Clark Corp., 149 F.3d 1125, 1129 (10th Cir. 1998) (evidence showing only employer's reliance on erroneous information insufficient to defeat summary judgment at pretext stage); see also Reynolds v. School Dist. No. 1, 69 F.3d 1523, 1535-36 (10th Cir. 1995) (true motivating reason not shown to be pretext merely because, in hindsight, it involved poor business judgment).

Plaintiff argues that several additional items of evidence, not addressed by the district court, bolster his showing of pretext. We have reviewed these and conclude they do not undermine the validity of the summary judgment entered for defendants. For example, he notes the last routine evaluation by his immediate supervisor found him "highly successful," and he argues that subsequent use of a survey to assess the staff's views was an improper deviation from standard-practice. The performance evaluation, unsigned by the CCD president (defendant Byron McClenney) who fired plaintiff, and relating in any event to a time period prior to the crisis in staff confidence prompting (and reflected by) the survey, does not imply any motive other than an attempt to deal with that crisis. And there is no indication that the

survey, a practical response to an evident problem, violated any specified personnel rule or policy.

Plaintiff claims a nonparty supervisor told him that his non-minority predecessor had also been the target of complaints, but these were ignored by McClenney. In addition to the obvious hearsay problem, this statement, which does not specify the source, subject, severity, or frequency of the ignored complaints, hardly constitutes competent probative evidence of disparate treatment. See Murray, 45 F.3d at 1422. Similar admissiblity/specificity problems attend his claim that the same supervisor told McClenney that he felt plaintiff's department was doing a good job.

Plaintiff states that on one occasion McClenney refused to give him requested feedback about staff complaints, which McClenney would not even acknowledge. This isolated anecdote, portraying McClenney as unforthcoming about matters which on many other occasions he pursued with persistence and vigor, is uncharacteristic, but considered with all of McClenney's pertinent conduct, it does not undercut the cited basis for plaintiff's termination. At-most it reflects a lapse in supervisory communication, which in itself is not a cognizable basis for a Title VII claim. See generally Archuleta v. Colorado Dep't of Institutions, 936 F.2d 483,487 (10th Cir. 1991) (Title VII prohibits specified discrimination, but does not broadly ensure fair treatment in other respects). Plaintiff also claims McClenney expressly recognized his department's role as a lightning rod for staff dissatisfaction, and suggests this "concession" precluded McClenney from holding plaintiff personally responsible for criticism of the department. But, certainly, McClenney was entitled to

distinguish such routine, low-level grousing from the crisis in confidence cited as the basis for terminating plaintiff.

Finally, plaintiff advances some additional objections concerning the survey. He complains that it was designed in accordance with McClenney's direction--as if the implementation of the concerns and objectives of the most important user of this assessment tool somehow implicated improper motives not otherwise evident from its content. Plaintiff's criticism that McClenney did not discuss the survey results with him is, again, a generic workplace grievance over supervisory communication outside the scope of Title VII.

In sum, plaintiff has failed to demonstrate the existence of legal or factual issues barring summary judgment. The judgment is AFFIRMED.

Entered for the Court

Mary Beck Briscoe
Circuit Judge

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

[Filed November 20, 1997]

Civil Action No. 97 N 125

LARRY N. CHAMBERS, SR.,)
Plaintiff,)
)
v.)
)
BYRON MCCLENNEY, individually)
and in his official capacity as President)
of the Community College of Denver;)
JERRY WARTGOW, individually and)
in his official capacity as President of)
the State Board for Colorado Community)
Colleges and Occupational Education;)
MARY ELLEN MCELDOWNEY,)
individually and in her official capacity as)
Vice-President for Legal Affairs for the)
State Board of Colorado Community)
Colleges and Occupational Education;)
GLENDA BARRY; ROLF ANDERSON;)
SUSAN AYRES DAVIES; JOHN FREW;)
JULIANNE HAEFELI; WILLIAM)
HORNBY; KRISTY SCHLOSS;)
RALPH TORRES; RAYMOND WILDER,)

in their official capacities as voting members)
of the State Board for Community Colleges)
and Occupational Education; COLORADO)
STATE BOARD FOR COMMUNITY)
COLLEGES AND OCCUPATIONAL)
EDUCATION,)
Defendants.)

Judge Edward W. Nottingham

ORDER AND MEMORANDUM OF DECISION

This is an employment-discrimination case. Plaintiff Larry N. Chambers, Sr. alleges that Defendants Byron McClenney, Jerry Wartgow, Mary Ellen McEldowney, Glenda Barry, RolfAnderson, Susan Ayres Davies, John Frew, Julianne Haefeli, William Hornby, Kristy Schloss, Ralph Torres, Raymond Wilder, and the Colorado State Board for Community Colleges and Occupational Education [hereinafter "CSBCCOE"] discriminated against him because of his race and age in violation of: (1) 42 U.S.C.A. § 1981 (West 1994); (2) 42 U.S.C.A. § 1983 (West Supp. 1997); (3) title VII of the Civil Rights Act of 1964, 42 U.S.C.A. §§ 2000e to 2000e-17 (West 1994), *amended by* Civil Rights Act of 1991, 42 U.S.C.A. § 1981a (West 1994) [hereinafter "title VII"]; and (4) the Age Discrimination in Employment Act, 29 U.S.C.A. §§ 621-634 (West 1985 & Supp. 1997) [hereinafter "ADEA"]. Plaintiff seeks damages and injunctive relief. The matter is before the court on defendants' "Motion for Summary Judgment" filed August 13, 1997. Jurisdiction is based on 28 U.S.C.A. § 1343 (West 1993), 29 U.S.C.A. § 626(c), 633a(c) (West 1985), and 42 U.S.C.A. § 2000e-5(f)(3) (West 1994).

Order & Memorandum of Decision District of Colorado
November 20, 1997

On October 17, 1997, I held a final pretrial conference in this case. Based upon the study and analysis which I had undertaken before that conference, I orally announced my intention to grant only certain parts of the motion for summary judgment. I also set the remaining claims for trial. Based upon further study and analysis, I have decided that the motion should be granted in its entirety. Accordingly, the case will be dismissed and the trial date vacated.

FACTS

Plaintiff is a fifty-three-year-old African-American citizen. (Br. in Opp'n to Defs.' Mot. for Summary Judgment, Ex. 1 [Chambers Aff. ¶ 2] [filed Sept. 10,1997] [hereinafter "Pl.'s Resp."].) According to plaintiff, he possesses a bachelor's degree in psychology, a master's degree in public administration, and, except for his dissertation, has completed the requirements for a Ph.D. in public administration. (*Id.* Ex. 1 [Chambers Aff. ¶ 2].) Defendants do not appear to dispute this.

The Community College of Denver ("CCD") is one of thirteen community colleges which are governed by CSBCCOE. (Defs.' Mem. Br. in Supp. of Mot. for Summ. J., Statement of Undisputed Material Facts ¶ 1 [filed Aug. 13, 1997] [hereinafter "Defs.' Br."].); *admitted at* Pl.'s Resp., Resp. to Statement of Undisputed Material Facts ¶ 1.) CSBCCOE is a lay board of nine voting members appointed by the governor. *(Id.,* Statement of Undisputed Material Facts ¶ 2; *admitted at* Pl.'s Resp., Resp. to Statement of Undisputed Material Facts ¶ 2.) Glenda Barry, Rolf Anderson, Susan Ayres Davies, John Frew, Julianne Haefeli,

William Hornby, Kristy Schloss, Ralph Torres, and Raymond Wilder [hereinafter collectively "Board Members"] serve on the CSBCCOE. Wartgow is President of CSBCCOE. *(Id.,* Statement of Undisputed Material Facts ¶ 3; *admitted at* Pl.'s Resp., Resp. to Statement of Undisputed Material Facts ¶ 3.) McClenney is the President of CCD. *(Id.,* Statement of Undisputed Material Facts ¶ 7; *admitted at* Pl.'s Resp., Resp. to Statement of Undisputed Material Facts ¶ 7.) In that role, McClenney has the authority to hire and fire personnel. *(Id.,* Statement of Undisputed Material Facts ¶ 7; *admitted at* Pl.'s Resp., Resp. to Statement of Undisputed Material Facts ¶ 7.) McEldowney serves as Vice President for Legal Affairs, including supervision of the CSBCCOE's human resources office. *(Id.,* Statement of Undisputed Material Facts ¶ 5; *admitted at* Pl.'s Resp., Resp. to Statement of Undisputed Material Facts ¶ 5.) No official CSBCCOE policy requires community college presidents to consult with McEldowney prior to making personnel decisions. *(Id.,* Statement of Undisputed Material Facts ¶ 6; *admitted at* Pl.'s Resp., Resp. to Statement of Undisputed Material Facts ¶ 6.) According to plaintiff, however, the practice of college presidents is to consult McEldowney prior to making such decisions. (Pl.'s Resp., Resp. to Statement of Undisputed Material Facts ¶ 6; *disputed at* Reply Br. of Defs.', Resp. Concerning Disputed Facts ¶ 6 [filed Sept. 22, 1997] [hereinafter "Defs.' Reply"].)

On March 15, 1988, plaintiff began working at CCD. (First Am. Compl. ¶ 12 [filed May 5, 1997] [hereinafter "Am. Compl."]; *admitted at* Answer to First Am. Compl. ¶ 11 [filed May 19, 1997] [hereinafter "Answer to Am. Compl."].) Plaintiff served as Director of Personnel and, later, as both the Human Resources Director and the

Affirmative Action Officer. *(Id.; admitted at* Answer to Am Compl. ¶ 11.) In his positions as Director of Personnel and Human Resources Director, plaintiff reported primarily to Vice President of Administrative Services, Steve Hunter. (Defs.' Br., Statement of Undisputed Material Facts ¶ 14; *admitted at* Pl.'s Resp., Resp. to Statement of Undisputed Material Facts ¶ 14.) In his capacity as the CCD Affirmative Action Officer, however, he reported directly to McClenney. (Pl.'s Resp., Resp. to Statement of Undisputed Material Facts ¶ 15; *admitted at* Defs.' Reply, Resp. Concerning Disputed Facts ¶ 15.)

According to defendants, the classified and faculty councils, which are "groups that represent employee constituencies," began in 1992 and 1993 to express concerns about plaintiff's performance. (Defs.' Br., Statement of Undisputed Material Facts ¶ 25; *disputed at* Pl.'s Resp., Resp. to Statement of Undisputed Material Facts ¶ 25.) Specifically, complaints addressed the poor quality of employee handbooks and the lack of responsiveness from plaintiff's office. *(Id.,* Statement of Undisputed Material Facts ¶ 25; *disputed at* Pl.'s Resp., Resp. to Statement of Undisputed Material Facts ¶ 25.) According to plaintiff, he knew of no complaints from faculty and complaints from others were merely "petty complaints about plaintiff's staff." (Pl.'s Resp., Resp. to Statement of Undisputed Material Facts ¶ 25.) Plaintiff contends that the employee handbooks were complimented and that any problem with the handbooks was due to McClenney's refusal to provide necessary resources. *(Id.,* Resp. to Statement of Undisputed Material Facts ¶ 25, Ex. 1 [Chambers Aff. ¶ 16].)

Defendants contend that McClenney met with plaintiff on several occasions to discuss concerns about plaintiff's performance, the first such meeting occurring in 1994. (Defs.' Br., Statement of Undisputed Material Facts ¶ 27; *disputed in part at* Pl.'s Resp., Resp. to Statement of Undisputed Material Facts ¶ 27.) According to plaintiff, the 1994 meeting did not address any criticisms of his performance. (Pl.'s Resp., Resp. to Statement of Undisputed Material Facts ¶ 27.) According to defenders, McClenney met again with plaintiff in 1995 regarding the "critical need to improve [h]is office." (Defs.' Br., Statement of Undisputed Material Facts ¶ 25; disputed at Pl.'s Resp., Resp. to Statement of Undisputed Material Facts ¶ 28.) Plaintiff claims the meeting never took place. (Pl.'s Resp., Resp. to Statement of Undisputed Material Facts ¶ 28, Ex. 1 [Chambers Aff. ¶ 19].) Finally, in 1996, McClenney met with a large group of classified employees who raised serious and extensive concerns about plaintiff's performance. (Defs.' Br., Statement of Undisputed Material Facts ¶¶ 30--31.) Plaintiff disputes what happened at that meeting. (Pl.'s Resp., Resp. to Statement of Undisputed Material Facts ¶¶ 30-31.)

In 1996, there was an evaluation of McClenney's performance as CCD President. The evaluation included appraisals of various departments of CCD and revealed negative comments about plaintiff and the performance of his office. (Defs.' Br., Statement of Undisputed Material Facts ¶ 32.) Plaintiff does not dispute that the negative comments were received. He contends, however, (without offering support in the record) that they were actually made by one individual and separated to appear as though multiple individuals had made the criticisms. (Pl.'s Resp., Resp. to

Statement of Undisputed Material Facts ¶ 32.)

CCD employed plaintiff pursuant to a contract, subject to annual renewal, which it renewed each year until plaintiff's termination. (Am. Compl. ¶ 12, *admitted in pertinent part at* Answer to Am Compl. ¶ 11.) In April 1996, Hunter suggested to plaintiff that he resign. (Pl.'s Resp., Resp. to Statement of Undisputed Material Facts ¶ 34; *admitted in pertinent part at* Defs.' Reply, Resp. Concerning Disputed Facts ¶ 34.) Plaintiff refused to tender his resignation. (*Id.*, Resp. to Statement of Undisputed Material Facts ¶ 34; *admitted in pertinent part at* Defs.' Reply, Resp. Concerning Disputed Facts ¶ 34.) Sometime thereafter, McClenney ordered a survey of the Administrative Services areas under Hunter's supervision. (Defs. Br., Statement of Undisputed Material Facts ¶ 34; *admitted in pertinent part at* Pl.'s Resp., Resp. to Statement of Undisputed Material Facts ¶ 34; *admitted in pertinent part at* Defs.' Reply, Resp. Concerning Disputed Facts ¶ 34.) Although plaintiff disputes the meaning of the survey results, defendants contend that the survey reflected a dissatisfaction with the performance of the Human Resources department under plaintiff's direction. (Defs' Br., Statement of Undisputed Material Facts ¶¶ 36, 42; Pl.'s Resp., Resp. to Statement of Undisputed Material Facts ¶¶ 36, 42.)

On June 25, 1996, McClenney wrote a letter to plaintiff advising him that he would not receive a contract for the 1996-97 academic year, thus ending plaintiff's employment effective June 30, 1996. (Am. Compl. ¶ 14; *admitted at* Answer to Am. Compl. ¶ 13.) At the time of plaintiff's termination he was earning an annual salary of

$55,600. (Defs.' Br., Statement of Undisputed Material Facts ¶ 17; *admitted at* Pl.'s Resp., Resp. to Statement of Undisputed Material Facts ¶ 17.) Defendants hired Barbara Wilson to replace plaintiff. *(Id.,* Statement of Undisputed Material Facts ¶ 45; *admitted at* Pl.'s Resp., Resp. to Statement of Undisputed Material Facts 4 45.) Wilson is a Japanese-American woman over the age of forty. *(Id.,* Statement of Undisputed Material Facts ¶ 45; *admitted at* Pl.'s Resp., Resp. to Statement of Undisputed Material Facts ¶ 45.) Her starting salary at CCD was $60,000. *(Id.,* Statement of Undisputed Material Facts ¶ 17; *admitted at* Pl.'s Resp., Resp. to Statement of Undisputed Material Facts ¶ 17.) Also under Hunter's supervision was Niles Downen, Controller of CCD. (*Id.*, Statement of Undisputed Material Facts 4 15; *admitted at* Pl.'s Resp., Resp. to Statement of Undisputed Material Facts ¶ 15.) Downen is a white male. ('Pl.'s Resp., Resp. to Statement of Undisputed Material Facts ¶ 19; *admitted in pertinent part* at Defs.' Reply, Resp. Concerning Disputed Facts ¶ 19.) Defendants paid Downen $62,000 in 1995-96. (Defs.' Br., Statement of Undisputed Material Facts ¶ 24; *admitted at* Pl.'s Resp., Resp. to Statement of Undisputed Material Facts ¶ 24.)

On January 22, 1997, plaintiff filed a complaint in this court. (Compl. [filed Jan. 22, 1997].) On May 5, 1997, plaintiff filed his first amended complaint expanding his allegations. (Am. Compl.) Plaintiff alleges the following against all defendants: (1) a claim, based on sections 1981 and 1983, for violation of his right to equal employment

opportunity[1] (claim I); (2) a section 1983 claim for violation of due process rights (claim II); (3) a title VII claim (claim III); and (4) an ADEA claim (claim IV). On May 19, 1997, defendants moved to dismiss part of plaintiffs first amended complaint. (Mot. to Dismiss First Am. Compl., In Part [filed May 19, 1997] [hereinafter "Mot. to Dismiss"].) On June 26, *1997,* I granted in part and denied in part defendants' motion to dismiss. (Order and Mem. of Decision [filed June 26, 1997].) Pursuant to my ruling on defendants' motion to dismiss, the following claims remained: (1) plaintiffs claims under sections 1981 and 1983 against the individual defendants in their individual capacities; (2) plaintiffs section 1981 claim insofar as it sought injunctive relief, against the individual defendants (McClenney, Wartgow, and McEldowney, and the Board Members), in their *official* capacities, and CSBCCOE; (3) plaintiff's title VII claim against the individual defendants in their official capacities and CSBCCOE; and (4) plaintiffs ADEA claim against the individual defendants in their official capacities and CSBCCOE.

On August 13, 1997, defendants moved for summary judgment. (Mot. for Summary Judgment [filed Aug. 13, 1997].) Defendants argue they are entitled to summary judgment on all of plaintiff's claims because he is unable to establish the elements required for a showing of

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[1] In his amended complaint, plaintiff repeatedly refers to denial of his right to equal employment opportunity. Based on plaintiff's allegations, I interpret his claim as seeking redress for denial of his right to equal protection as protected by the Fourteenth Amendment.

discrimination or retaliation. (Defs.' Br.) Further, defendants contend that McEldowney and Wartgow in their individual capacities are entitled to summary judgment on plaintiff's section 1981 claim. Defendants also argue that McClenney, Wartgow, and McEldowney, in their individual capacities are entitled to qualified immunity.

ANALYSIS

I. Legal Standard

Under rule 56(c), the court may grant summary judgment where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." 'Fed. R. Civ. P. 56(c); *see Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250, 106 S. Ct. 2505, 2511 (1986); *Concrete Works, Inc. v. City and County of Denver*, 36 F.3d 1513, 1517 (10th Cir. 1994), *cert. denied*, 115 S. Ct. 1315 (1995). The moving party bears the initial burden of showing an absence of evidence to support the nonmoving party's case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325, 106 S. Ct. 2548, 2554 (1986). "Once the moving party meets this burden, the burden shifts to the nonmoving party to demonstrate a genuine issue for trial on a material matter." *Concrete Works, Inc., 36* F.3d at 1518 (citing *Celotex Corp.*, 477 U.S. at 325, 106 S. Ct. at 2554). The nonmoving party may not rest solely on the allegations in his or her pleadings, but must instead designate "specific facts showing that there is a genuine issue for trial.' *Celotex Corp.*, 477 U.S. at 324, 106 S. Ct. at 2553; Fed. R. Civ. P. 56(e).

The court may consider only admissible evidence when ruling on a summary judgment motion. *See World of Sleep, Inc. v. La-Z-Boy Chair Co., 756* F.2d 1467, 1474 (10th Cir. 1985). The factual record must be viewed in the light most favorable to the nonmoving party. *Concrete Works, Inc., 36* F.3d at 1518 (citing *Applied Generics Int'l, Inc. v. First Affiliated Sec., Inc.*, 912 F.2d 1238, 1241 [10th Cir. 1990]).

Plaintiff has taken the somewhat unusual procedural tactic of supporting his response to defendants' motion for summary judgment with a prolix, thirty-six-page *affidavit*. Although the affidavit includes numerous exhibits which support some of the allegations made by plaintiff, the affidavit is largely conclusory, self-serving, and irrelevant. An affidavit must be based on personal knowledge and set forth facts which would be admissible in evidence. Fed. R. Civ. P. 56(e). "[C]onclusory and self-serving affidavits are not sufficient." H*all v. Bellmon, 935* F.2d 1106, 1111 (10th Cir. 1991); *accord Murray v. City of Sapulpa, 45* F.3d 1417, 1422 (10th Cir. *1995)*. I have reviewed the affidavit and the attachments thereto, and rely only on admissible portions.

Further, I note at the outset that the parties' failure to adhere to this court's Hearing, Conference, and Trial Procedures has made difficult the determination of whether disputed issues of material fact preclude summary judgment. Section VI(4) of this court's procedures requires a party responding to a motion for summary judgment to respond to the statement of undisputed material facts included in the original motion any denials *with factual reasons and specific references to material in the record* supporting such denials. Section VI(5) of this court's procedures governs the manner

in which a party opposing the motion may offer additional disputed facts. Such additional disputed facts must be offered in a separate section styled as this court requires. Finally, section VI(6) requires the movant, in replying to the opposition to the summary-judgment motion to reply with *specific reference to material in the record.* Although the parties have failed to comply with the court's procedures, I have evaluated their assertions and considered them in light of the material in the record to determine the propriety of summary judgment.

2. Title VII, ADEA, Section 1981, and Section 1983

To state a valid claim of discrimination under title VII, the ADEA, and sections 1981 and 1983, plaintiff must prove by a preponderance of the evidence that defendant engaged in intentional discrimination. *See St. Mary's Honor Ctr. v. Hicks, 509* U.S. 502, 506-08, 113 S. Ct. 2742, 2747-48 (1993); *Bolton v. Scrivner, Inc.,* 36 F.3d 939, 944 (10th Cir. 1994) ("ADEA claims are analyzed under the three-step framework outlined in *[McDonnell Douglas].*"); *Cone v. Longmont United Hosp. Ass'n,* 14 F.3d *526, 529* (10th Cir. 1994) (recognizing use of *McDonnell Douglas* analytical framework in ADEA context); *Drake v. City of Fort Collins,* 927 F.2d *1156,* 1162 (10th Cir. 1991) (noting that discrimination claims, whether brought under section 1981, section 1983, or title VII, follow *the McDonnell Douglas* framework). He may satisfy his burden of persuasion by producing (1) direct evidence of defendant's discriminatory motive or (2) indirect evidence of discrimination through a series of shifting evidentiary burdens described by the Supreme Court in *McDonnell Douglas Corp. v. Green,* 411

U.S. 792, 93 S. Ct. 1817 (1973). *See Texas Dep't of Community Affairs v. Burdine,* 450 U.S. 248,255-56, 101 S. Ct. 1089, *1094-95* (1981); *Elmore v. Capstan, Inc., 58* F.3d *525,529* (10th Cir. 1995). Under either approach, the plaintiff bears the burden of proving, by a preponderance of the evidence, that defendant engaged in unlawful discrimination. *See James v. Sears, Roebuck and Co.,* 21 F.3d 989, 992 (10th Cir. 1994) (citing *Faulkner v. Super Valu Stores, Inc.,* 3 F.3d 1419, 1425 [10th Cir. 1993]). Because he offers no direct evidence of discrimination, plaintiff must present sufficient indirect evidence in order to avoid the entry of summary judgment in defendant's favor. *See Burdine, 450* U.S. at 255-56, 101 S. Ct. at 1094-95; *Elmore,* 58 F.3d at 529.

Under the three-stage *McDonnell Douglas* analysis, plaintiff must first establish a *prima facie* case of discrimination based on his race and his age. *See Elmore,* 58 F.3d at 529-30; *Hooks v. Diamond Crystal Specialty Foods, Inc.,* 997 F.2d 793,796 (10th Cir. 1993); *Luna v. City & County of Denver,* 948 F.2d 1144, 1147 (10th Cir. 1991). "The burden of establishing a *prima facie* case of disparate treatment is not onerous." *Burdine,* 450 U.S. at 253,101 S. Ct. at 1094. To establish a *prima facie* case of discrimination, plaintiff must show that: (1) he is a member of a protected class; (2) he was qualified for and satisfactorily performing his job; and (3) he was terminated under circumstances giving rise to an inference of discrimination. *Martin v. Nannie and the Newborns, Inc.,* 3 F.3d 1410, 1416-17 (10th Cir. 1993). If plaintiff establishes the *prima facie* elements of a title VII claim, the burden of production shifts to defendant to articulate, though not necessarily prove, a legitimate, nondiscriminatory reason for the challenged action. *See*

Burdine, 450 U.S. at 254-56, 101 S. Ct. at 1094; *Elmore,* 58 F.3d at 530; *Hooks,* 997 F.2d at 796; *Luna,* 948 F.2d at 1147. If defendant articulates a proper basis for its conduct, the burden shifts back to plaintiff to prove that defendant's proffered reasons are simply a pretext for illegal discrimination. *See McDonnell Douglas,* 411 U.S. at 804-05, 93 S. Ct. at 1825; *Elmore,* 58 F.3d at 530; *Hooks,* 997 F.2d at 796; *Luna,* 948 F.2d at 1147. To withstand a motion for summary judgment, plaintiff may also present evidence that defendant's asserted reason for an adverse employment action is unworthy of belief. *Randle v. City of Aurora,* 69 F.3d 441, 451-53 (10th Cir. 1995). Notwithstanding the shifting burden of production, plaintiff retains the ultimate burden of proving that "the employment decision was the result of intentional discrimination based on an impermissible motive." *Martin,* 3 F.3d at 1417 (citing *Burdine,* 450 U.S. at 256, 101 S. Ct. at 1095); *see St. Mary's Honor Or.,* 113 S. Ct. at 2747; *Hooks,* 997 F.2d at 797.

a. Prima Facie Case

i. Discrimination

The element of the *prima facie* case which defendants dispute is that plaintiff was" satisfactorily performing his job. (Defs.' Br. at 17.) Recognizing that the burden of proving a *prima facie* case is not onerous, I conclude that plaintiff has satisfied this first step of the *McDonnell Douglas* framework. Plaintiff is an African-American male and over the age of forty. Thus he is a member of a protected class under title VII and the ADEA. Defendants terminated plaintiff's employment by not offering him an contract for the 1996-97 year. Further,

defendants hired Barbara Wilson to replace plaintiff. Wilson, who is forty-three years old, is younger than plaintiff and is Japanese-American. With regard to whether plaintiff was qualified for and satisfactorily performing his job, the parties do not dispute that defendants had rehired plaintiff for a series of annual contracts over eight years and that plaintiff had received a performance evaluation from his supervisor indicating that his performance was "highly successful." I conclude that plaintiff has satisfied his burden of establishing a *prima facie* case.

ii. Retaliation

The elements of a *prima facie* case of retaliation are (1) the plaintiff engaged in a protected activity under title VII or the ADEA, (2) the plaintiff suffered an adverse employment action contemporaneous or subsequent to such protected action, and (3) there is a causal connection between the activity and the adverse employment action. *Cole v. Ruidoso Mun. Schs.*, 43 F.3d 1373, 1381-82 (10th Cir. 1994). If a plaintiff establishes a *prima facie* case of retaliation, the burden-shifting framework *of McDonnell Douglas* applies, requiring the defendant to articulate a legitimate nondiscriminatory reason for the adverse action and then requiring the plaintiff to prove discrimination, or, on a motion for summary judgment, that defendant's proffered reason is unworthy of belief.

For purposes of their summary-judgment motion, defendants concede that plaintiff engaged in protected activities. (Defs.' Br. at 23.) According to defendants, plaintiff cannot establish that he suffered an adverse employment action as a result of his activities or that there is

a causal connection between his activities and the alleged adverse action. *(Id.* at 23-24.) The record indicates that in 1991 plaintiff complained to McClenney of salary inequities between himself and other administrative personnel at CCD. *(See* Pl.'s Resp., Ex. 1 [Chambers Aff., Attach. 3 (memorandum from plaintiff to McClenney of 12/18/91].) Again in 1995, plaintiff complained to Mr. Hunter of what he perceived as a salary disparity. *(See* Pl.'s Resp., Ex. 1 [Chambers Aff., Attach. 13 (memorandum from plaintiff to Mr. Hunter of 6/26/95)].) Approximately a year from the time of plaintiff's last complaint regarding salary inequities, defendants refused to renew plaintiff's contract. Plaintiff may establish the causal connection prong of the *prima facie* case by demonstrating temporal proximity. *Connor v. Schnuck Mkts., Inc.,* 121 F.3d 1390, 1398 (10th Cir. 1997) 339, 343 (10th Cir. 1982) ("The causal connection may be demonstrated by evidence of circumstances that justify an inference of retaliatory motive, such as protected conduct closely followed by adverse action."). Generally, although the determination of temporal proximity is fact specific to each case, the Tenth Circuit considers temporal proximity to exist if the adverse action follows within three years of the protected activity. *See Chavez v. City of Arvada,* 88 F.3d 861,866 (10th Cir. 1996) (citing *Candelaria v. EG & G Energy Measurements, Inc.,* 33 F.3d 1259, 1261 [10th Cir. 1994]), *cert. denied,* 117 S. Ct. 684 (1997). Plaintiff's last complaint was approximately one year before the adverse employment decision. Additionally, the record indicates "continuing friction" over this issue between the parties. *See Chavez,* 88 F.3d at 866 (noting that singular incident ten years prior to adverse action is insufficient to establish a causal connection). I conclude, therefore, that plaintiff established a

causal connection and thus the elements necessary for a *prima facie* case of retaliation.

b. Articulation of Legitimate Non-Discriminatory Reason

Defendants contend that plaintiff's salary during his employment at CCD and his ultimate termination from CCD were based on merit evaluations of his performance. *(See* Defs.' Br. at 19, 22.) Although plaintiff disputes that those were the real reasons for his treatment at CCD, he does not dispute that defendants have articulated a legitimate, non-discriminatory reason for his treatment.

c. Pretext

After establishing a *prima facie* case, a plaintiff may survive a motion for summary judgment and proceed to trial by simply presenting "evidence that the defendant[s]' proffered reason[s] for the employment decision[s] [were] pretextual -- i.e. [,] unworthy of belief." *Randle,* 69 F.3d at 451. As proof on the issue of pretext, plaintiff here has offered evidence concerning (1) a pay disparity between plaintiff and other allegedly similarly-situated persons and (2) his complaints to McClenney and Wartgow that criticisms of him were the result of racial animus. Much of plaintiffs affidavit is either inadmissible or irrelevant, and I conclude that the minimal evidence which he has presented does not create a disputed issue of material fact regarding pretext for discrimination.

Plaintiff has offered evidence which, when viewed in

the light most favorable to him, shows disputed issues of fact regarding the pay disparity between himself and other CCD employees. I do not believe that this evidence is material. It does not support a finding of pretext for two reasons. First, plaintiff has failed to demonstrate as a foundational matter that any of the employees in question are similar to him. Without such a showing, any pay disparity proves nothing. Second, and more important, evidence of a pay disparity in these circumstances does not support an inference of pretext. Assuming, *arguendo,* that plaintiff and the employees to whom he is being compared are truly similarly-situated, evidence of a disparity might, at most, support an inference that plaintiff had suffered discrimination in a term or condition of employment. It provides insufficient logical support for an inference that the asserted reason for not renewing his contract-- widespread dissatisfaction with his performance -- was not the true reason.

As further evidence of pretext, plaintiff claims that, after he refused a request to resign, defendants conducted a phony survey which revealed the dissatisfaction which formed part of the basis for non-renewal of his contract. This, claims plaintiff, was pretextual partly because he had already complained to McClenney and Wartgow that criticism of him was racially motivated, and yet the survey included respondents falling within the category of persons who were the subject of his complaints. Plaintiff alleges that the survey was designed improperly and that the results were interpreted improperly. To support his position he offers only his conclusory affidavit statements. Plaintiff provides no competent evidence which raises any issue of material fact regarding the survey design or results. Plaintiff's affidavit

alludes to an "expert witness" who, according to plaintiff, stated that such a survey should have been accompanied by a written methodology. (Pl.'s Resp., Ex. 1 [Chambers Aff. ¶ 30].) Plaintiff, however, offers no material from this "expert witness" to substantiate his criticisms of the survey.

According to plaintiff, the Administrative Services Survey "singled [plaintiff] out by using the word 'target' to give [Hunter's] critics an opportunity to level unsubstantiated complaints against me and Human Resources." (Pl.'s Resp., Ex. 1 [Chambers Aff. ¶ 30].) His allegation that the survey unfairly targeted him is unsupported by the record. The cover memorandum to the survey states that it addresses the four Administrative Service areas in CCD and that the results will be used "to target service areas in the Administrative Services that need improvement." (Pl.'s Resp., Ex. 1 [Chambers Aff., Attach 17 (Administrative Services Questionnaire Memorandum from Hunter to all full-time employees of 4/22/96)].) No reasonable interpretation of that sentence indicates that plaintiff was being targeted by the survey and plaintiff offers no evidence, other than his conclusory allegations, to the contrary.

The overwhelming, fundamental problem with plaintiff's argument that the survey was concocted to provide a pretext for not renewing his contract is that it is circularly based on plaintiff's inadmissible and self-serving opinions concerning the basis for others' views about his performance. He cites material concerning (1) general racial disharmony on the CCD campus *(see* Pl.'s Resp., Ex. 1 [Chambers Aff. ¶ 16, Attach. 8 (memorandum from plaintiff and the Afro-American Staff Council to McClenney of 10/22/91), and (2)

specific complaints he made to defendants that the criticisms against him were racially motivated, *(see* Pl.'s Resp., Ex. 1 [Chambers Aff. ¶ 17 ("I told McClenney that I was being subjected to a double standard and that racism was behind many of the complaints.")]; *id.*, Ex. 1 [Chambers Aff., Attach. 18 (memorandum from plaintiff to Wartgow of 4/6/96 [discussing racial polarization and racial intolerance in connection with Administrative Services Survey])].) This material, however, remains nothing more than a compilation of plaintiff's opinions concerning the survey and the supposed racial basis for the opinions of those surveyed. It is not admissible evidence.

Plaintiff contends that the complaints against him were unfounded. The court does not sit, however, to "second-guess an employer's business judgment." *Branson v. Price River Coal Co.*, 853 F.2d 768, 772 (10th Cir. 1988). Accordingly, plaintiff's own assessment of his ability is insufficient to demonstrate that defendants' assessment of him, based on the Administrative Services survey, was pretext for discrimination. *Id.*, 853 F.2d at 772 ("It is the perception of the decision maker which is relevant, not plaintiff's perception of [him]self."); *see Gustovich v. A T & T Communications, Inc.*, 972 F.2d 845, 848 (7th Cir. 1992) '(recognizing that an employee's self-serving statements about his own abilities "do nothing . . . to establish that the proffered reason is a pretext for discrimination"). Even if the discontent and criticisms leveled against plaintiff which were reflected in the Administrative Services Survey were unfounded, that does not raise an issue of material fact regarding pretext. *See Reynolds v. School Dist. No. 1, Denver, Colo.*, 69 F.3d 1523, 1535 (10th Cir. 1995) ("[A]n employer's exercise of erroneous or

even illogical business judgment does not constitute pretext.") Accordingly, summary judgment is warranted on plaintiffs title VII, ADEA, section 1981, and section 1983 claims.

3. Claims Against McClenney, Wartgow, and McEldowney, in their Individual Capacities

In any event, the claims against the individual defendants in their individual capacities are barred by the doctrine of qualified immunity. The doctrine of qualified immunity shields government officials performing discretionary functions from individual liability where their actions do not violate clearly established statutory or constitutional rights of which a reasonable person would have known. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 102 S. Ct. 2727, 2738 (1982); *Derda v. Brighton, Colo., 53* F.3d 1162, 1163-64 (10th Cir. 1995). Whether a defendant is entitled to qualified immunity is a question of law. *Derda,* 53 F.3d at 1164. Once a defendant claims qualified immunity, the plaintiff bears the heavy burden of demonstrating that: (1) defendant's alleged actions violated a constitutional or statutory right; and (2) the constitutional or statutory right was clearly established at the time of the alleged violation. *See Trigalet v. Young,* 54 F.3d 645,647 (10th Cir.) (quoting *Albright v. Rodriguez,* 51 F.3d 1531, 1533 [10th Cir. 1995]), *cert. denied, sub. nom Trigalet v. Warrick,* 116 S. Ct. 340 (1995); *Derda,* 53 F.3d at 1164. *"[I]n* some cases the determination of the 'objective' reasonableness of an official's conduct rests on establishing whether the defendant acted with an impermissible motive or intent - a highly 'subjective' factual element." *Lewis v. City of Fort Collins,* 903 F.3d 752, 755 (10th Cir. 1990). Such is the case with claims of racial

discrimination, where plaintiff must ultimately prove that race was a factor in the defendants' actions. *See id.* at 755 & n.1. For that reason, the Tenth Circuit has created a two-step analysis to be applied in situations such as this. Where a defendant's subjective intent is an element of plaintiff's claim and the defendant asserts he is entitled to summary judgment based on qualified immunity, the defendant must make a *prima facie* showing of the "objective reasonableness" of the challenged conduct. *See id.* at 755 (citing *Pueblo Neighborhood Health Ctrs., Inc. v. Losavio,* 847 F.2d 642, 649 [10th Cir. 1988]; *Martin v. D.C. Metro. Police Dept.,* 812 F.2d 1425, 1434 [D.C. Cir. 1987]). If the defendant establishes the objective reasonableness of his actions, the plaintiff may avoid summary judgment only by "producing specific evidence" that the official acted with a discriminatory motive.[2] *See Lewis,* 903 F.2d at 759; *Pueblo Neighborhood Health Ctrs., Inc.,* 847 F.2d at 649; *cf. Woodward v. City of Worland,* 977 F.2d 1392, 1398 (10th Cir. 1992) (''The vague, non-time-specific, and conclusory allegations that were made against the [defendants] were not sufficient to put at issue

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[2] Plaintiff misstates the standard for qualified immunity in a case such as this. According to plaintiff, defendants are not entitled to qualified immunity if they directly participate in a wrong or acquiesced thereto. (Pls. Resp. At 30.) The cases plaintiff cites, *William v. Smith,* 781 F.2d 319, 322-23 (2d Cir. 1986) and *Brown v. Benton,* 452 F. Supp. 28 (W.D. Okla. 1978), are not controlling and do not address the issue before the court -- the required showing on qualified immunity where a subjective element is part of plaintiff's claims. Rather, those cases simply discuss one of the elements of a section 1983 claim, that the actor have personal involvement in the challenged actions.

whether the [defendants'] conduct violated clearly established rights.").

Defendants have established the objective reasonableness of their actions. The evidence indicates that defendants terminated plaintiff because of concerns about his performance as CCD's Human Resources Director. Specifically, the record includes: (1) supervisor evaluations establishing plaintiff's weaknesses from 1991 and 1995, (Pl.'s Resp., Ex. 1 [Chambers Aff; ¶ 16, Attach. 11 [1991 Administrator Performance Evaluation Summary of plaintiff], Attach. 1 [1995 Administrator Performance Evaluation Summary of plaintiff]); (2) evidence of a 1993 meeting between plaintiff and McClenney where concerns about plaintiff's performance were raised, (Defs.' Br., Ex. C [McClenney Aff. ¶ 23]; Pl.'s Resp., Ex. 1 [Chambers Aff. ¶ 17]); and (3) survey results from 1991 and 1996 which reflect dissatisfaction with plaintiff's performance, (Defs.' Br., Ex. C [McClenney Aff., Ex. 3 (1996 Evaluation of President, Comments), Ex. 5 (1996 Administrative Services Survey)]; Pl.'s Resp., Ex. I [Chambers Aff. ¶ 16, Attach 7 (memorandum from plaintiff dated 11/15/91)]). Based on that evidence, defendants' decision to terminate plaintiff's employment was objectively reasonable. Plaintiff was not satisfying expectations and had lost the confidence of the CCD community.

Plaintiff has failed to produce specific facts which show that any of the three individual defendants -- McClenney, Wartgow, or McEldowney -- acted with a discriminatory motive. McEldowney was not even involved in the decision to terminate plaintiff and therefore could not

have acted with a discriminatory, motive. Even plaintiff does not assert that McEldowney acted based on impermissible, discriminatory, motives, but rather that she "had a long standing grudge against [him]." *See* Pl.'s Resp., Ex. 1 [Chambers Aff. ¶ 4].) Plaintiff has offered evidence of his complaint to Wartgow that racist attitudes existed on campus and that he was being unfairly targeted by the Administrative Services Survey. That he complained to Wartgow regarding those issues does not constitute a specific showing of Wartgow's discriminatory motives. In fact, the evidence indicates that when informed of plaintiff's concerns, Wartgow contacted McClenney and "was reassured that no decisions or actions regarding the status of [plaintiff] had been made or taken and that an independent evaluation of all departments within the CCD Administrative Services Division would be conducted." (Defs.' Br., Ex. A [Wartgow Aff. ¶ 7].) Plaintiff has offered no evidence which establishes that McClenney acted with a discriminatory motive. As with Wartgow, that plaintiff complained to McClenney that racism was involved in many of the complaints lodged against him does not constitute specific facts evidencing McClenney's discriminatory motive. Accordingly, I conclude that individual capacity defendants are entitled to qualified immunity on plaintiff's claims under sections 1981 and 1983.

4. Conclusion

Based on the foregoing, it is therefore

ORDERED that defendants' motion for summary judgment is GRANTED. All claims are DISMISSED with prejudice.

Dated this 20 day of November, 1997.

BY THE COURT:

/s/_____
EDWARD W. NOTTINGHAM
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 97 N 125

CERTIFICATE OF SERVICE

I hereby certify that a copy of the Order and Memorandum of Decision signed by Judge Edward W. Nottingham on November 20, 1997, was served on November 20, 1997, by hand-delivery were a "D.C." box number is indicated after the recipient's name, or otherwise by depositing it in the United States mail, postage prepaid, addressed to the recipient:

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Magistrate Judge Donald E. Abram

JAMES R. MANSPEAKER, CLERK

By /s/ _____
Deputy Clerk

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

[Filed March 3, 1999]

No. 97-1468

LARRY N. CHAMBERS, SR.,)
Plaintiff - Appellant,)
)
v.)
)
BYRON MCCLENNEY, individually)
and in his official capacity as President)
of the Community College of Denver;)
JERRY WARTGOW, individually and)
in his official capacity as President of)
the State Board for Colorado Community)
Colleges and Occupational Education;)
MARY ELLEN MCELDOWNEY,)
individually and in her official capacity as)
Vice-President for Legal Affairs for the)
State Board of Colorado Community)
Colleges and Occupational Education;)
GLENDA BARRY; ROLF ANDERSON;)
SUSAN AYRES DAVIES; JOHN FREW;)
JULIANNE HAEFELI; WILLIAM)
HORNBY; KRISTY SCHLOSS;)
RALPH TORRES; RAYMOND WILDER,)

in their official capacities as voting members)
of the State Board for Community Colleges)
and Occupational Education; COLORADO)
STATE BOARD FOR COMMUNITY)
COLLEGES AND OCCUPATIONAL)
EDUCATION,)
Defendants - Appellees.)

ORDER

Before **BRORBY, BRISCOE**, AND **LUCERO**, Circuit Judges.

Appellant's petition for rehearing is denied by the panel that rendered the decision.

Entered for the Court
PATRICK FISHER, Clerk of Court

by: /s/ _____
Deputy Clerk